No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

APPELLANT'S OPENING BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT

Appellant brought this action against appellee in the District Court of Guam for recovery of gross receipts tax claimed to have been erroneously paid. (R. doc. 1.) Appellee filed an answer incorporating therein certain counter-claims without stating them separately, alleging additional tax due to appellee. (R. doc. 5.) Jurisdiction of this action is vested in the District Court of Guam by § 19508.01 of the Government of Guam, and in the District Court of Guam and the United States Court of Appeals by the Organic Act of Guam, 48 U.S.C., § 1424(a).

STATEMENT OF THE CASE

The appellant is a corporation doing business in Guam and also, in the course of its business, selling goods and merchandise in interstate and foreign commerce for delivery outside Guam. The appellee is the duly appointed and presently acting Commissioner of Revenue and Taxation for the Government of Guam. By stipulation, appellant withdrew its claims in Counts Two, Three and Four of the complaint, leaving only Count One in issue. (R. doc. 12.) Appellee filed its answer, which apparently incorporated therein three counterclaims without stating them separately or designating them as such. (R. doc. 5.) The parties filed pre-trial memoranda (R. doc. 8, 9) and the Court's pre-trial order was filed January 21, 1963, (R. doc. 10.) On March 1, 1963, the parties entered into a stipulation of facts and submitted the action for decision by the Court on those stipulated facts. (R. doc. 12.) In those stipulated facts, it was agreed that the sales in issue involved goods for delivery outside Guam.

On March 14, 1963, the Court filed its findings of fact, conclusions of law and opinion. (R. doc. 13.) The Court held that appellant was not entitled to a refund of the $766.69 prayed for in Count One of its complaint, and held also that the appellee was entitled, on its alleged counterclaims, to an additional gross receipts tax of $182.72. Judgment was, therefore, ordered in favor of appellee on his alleged counterclaims in the amount of $182.72 and against

appellant on its claim for the refund of $766.69. From this judgment the appellant has appealed.

SPECIFICATION OF ERRORS

1. The Court erred in entering judgment for appellee on its alleged counterclaims when the Court lacked jurisdiction over the subject matter of said counterclaims, and when each of said counterclaims failed to state claims upon which relief could be granted.

2. The Court erred in refusing to order appellee to refund taxes claimed in the first count of appellant's complaint on the following grounds:

(a) As applied to this appellant, the gross receipts tax of the territory of Guam is erroneous and illegal in that said taxes are not uniformly applicable in taxing appellant's sales for delivery outside of Guam, and

(b) The assessment and collection of the gross receipts tax was erroneous and illegal in that said taxes were measured against gross proceeds of sales in foreign commerce and were of non-local application.

ARGUMENT

I. THE COURT ERRED IN ENTERING JUDGMENT FOR APPELLEE ON ITS ALLEGED COUNTERCLAIMS WHEN THE COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF SAID COUNTERCLAIMS, AND WHEN EACH OF SAID COUNTERCLAIMS FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED.

The appellee inserted three alleged counterclaims in his answer. The counterclaims are set forth as paragraphs 37, 38 and 39 of the answer. They are not designated separately nor are they designated anywhere in the answer as counterclaims. (R. doc. 5.)

Since the counterclaims were not denominated as such, appellant was not required to serve a reply thereto. Fed. Rules Civ. Proc. Rule 7, 28 U.S.C.A.

On January 21, 1963, appellant moved to dismiss the alleged counterclaims and the motion was heard by the Court on February 1, 1963. (R. doc. 7.) The trial court entered judgment against appellant without ever ruling on this motion, except as to the statement in the judgment itself that the Court has jurisdiction. (R. doc. 14.)

Sections 19503, et. seq., of the Government Code of Guam provide for the mandatory procedure to be followed by the Tax Commissioner for the enforcement of any delinquent tax assessment. Prior to taking legal action, the Commissioner must give written notice of the assessment and wait for thirty days subsequent thereto. Gov. Code of Guam, §§ 19503.0101, and 19503.0102.

The stipulations of fact set forth only that the Commissioner determined that the tax was due on an

audit of appellant's books. When appellant filed its complaint, the Commissioner elected to set forth the claim by way of counterclaims in the answer rather than follow the statutory procedure. It follows that the alleged counterclaims fail to state claims upon which relief could be granted and that the trial Court lacked jurisdiction.

II. AS APPLIED TO APPELLANT, BOTH THE GROSS RECEIPTS TAXES ASSESSED, AND ADJUDGED TO BE DUE UNDER THE COUNTERCLAIMS, WERE ERRONEOUS AND ILLEGAL AS NOT UNIFORMLY APPLICABLE.

The Organic Act of Guam provides in part as follows:

> "The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. Taxes and assessments on property, internal revenues, sales, licenses, and royalties for franchises, privileges, and concessions may be imposed for purposes of the Government of Guam *as may be uniformly provided* by the legislature of Guam. . . ." 48 U.S.C. § 1423a.

It is clear from the stipulated facts upon which this case was tried that the gross receipts tax at issue in the complaint and on the counterclaim relates to sales of products for delivery outside of Guam. The District Court of Guam has held that the gross receipts tax is invalid insofar as it purports to impose a tax on goods for delivery outside of Guam. *Ambros, Inc. v. A. G. Maddox,* 203 F.Supp. 934 (1962).

Carrying the logic of the Court in the *Ambros case* one step further, it is irrefutable that wholesalers selling their products to manufacturers, wholesalers or licensed retailers must not be required to pay the gross receipts tax either.

The first paragraph of § 19541.0104 of the Government Code of Guam provides as follows:

> "Provided, that a manufacturer or producer engaging in the business of selling his products to manufacturers, wholesalers, or licensed retailers, shall not be required to pay the tax imposed in this act for the privilege of selling such products at wholesale. . . ."

In the *Ambros case, supra,* the Court said:

> "This section literally means that a local manufacturer or producer who sells directly for export is to be given a competitive tax advantage over sellers for export who are neither manufacturers nor producers."

The Court, in the *Ambrose case;* was talking about selling goods for delivery outside Guam, but there is no logical distinction in the Code section between a manufacturer selling goods for delivery outside of Guam and a manufacturer selling his products to manufacturers, wholesalers, or licensed retailers. If the tax is not uniform as to off-island delivery, it is also not uniform as to all sales at wholesale. It follows that sales made by appellant to its parent company were properly not subject to the gross receipts tax whether such sales were at wholesale or for delivery outside of Guam. Any other interpretation, according

to the decision of the Court in the *Ambros case,* invalidates the tax as being not uniformly applicable.

When construing the decision of the *Ambros case,* together with the Court's opinion in the instant case, it is quite apparent that the Court attempts to arrive at a distinction between sales for delivery to the purchaser outside of Guam, and sales made at wholesale in Guam. It is submitted that there is no such valid decision and that the opinion of the Court was correct in the *Ambros case.* For compelling reasons of logic, the opinion in the instant case is erroneous. First of all, it is very clear from the stipulated facts that delivery was to be made outside Guam. The Court, in its opinion in the instant case, apparently decides that the tax is applicable because the transaction was not made in the "normal course of foreign commerce." It appears from the statute that this distinction is not the issue. The words used in the Code section do not refer to foreign commerce but merely state, "for delivery to the purchaser outside of Guam."

There is no conflict in the opinion in the instant case and the *Ambros case* except insofar as the Court misconstrues the facts and their construction under the statute in question. The *Ambros case* could not be clearer in holding that the tax is invalid as not uniformly applicable if it gives a competitive advantage to manufacturers and producers for sales for delivery outside Guam. The conclusion is also inescapable that if the tax is not uniformly applicable for such sales, it is also not uniformly applicable for

sales at wholesale to manufacturers, wholesalers, or licensed retailers. Gov. Code Guam, § 19541.0104.

III. PURSUANT TO THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, THE BUSINESS PRIVILEGE GROSS RECEIPTS TAX LAW OF GUAM IS AN EXPRESS BURDEN ON FOREIGN AND INTERSTATE COMMERCE, AND IS, THEREFORE, INVALID.

In the instant case, the Court in its opinion makes a finding that the transactions in issue were not undertaken in the normal course of foreign commerce. It is submitted that this fact is erroneous and is not supported by the findings of fact stipulated to. Further, § 19541.0101 of the Government Code of Guam clearly purports to impose a tax burden on foreign or interstate commerce. There seems to be little question that the commerce clause precludes the levying of a tax under state or territorial authority upon the gross receipts of interstate or foreign commerce, or upon the privilege of conducting such business measured by those gross receipts. *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422, 91 L. Ed. 993.

This Court in *Anderson v. Mullaney,* 199 F. 2d 123, (1951) has held that a territorial legislature has no greater freedom in burdening commerce than any of the several states in the Union. In the case of *Ambros, Inc. v. Maddox, supra,* the District Court of Guam stated that it was not "entirely persuaded that *Anderson v. Mullaney* was conclusive in view of *Arctic Maid v. Territory of Alaska,* 277 F. 2d 120, reversed 366 U.S. 199, 81 S.Ct. 929, 6 L. Ed. 2d 227. It is sub-

mitted that the reversal of the *Arctic Maid case* by the United State Supreme Court was not a ruling on the power of a territory to burden commerce, foreign or interstate. The Supreme Court in the reversal of the *Arctic Maid case* merely stated that the tax was not discriminatory and fell within the taxing powers of Alaska. In any event the *Arctic Maid case* could never be considered authority which in any way contradicts the holding of the *Anderson case* as to the power of a territory to impose burdens on interstate and foreign commerce.

The Court in the *Ambros case* held that the word "not" which had formerly been included in § 19541.0101 of the Government Code may have been inadvertently omitted. Mr. Justice Jackson is then quoted as saying that "Judicially we must tolerate what personally we may regard as a legislative mistake." It appears from the language of Mr. Justice Jackson that he was not talking about a typographical error or mistake in printing, but a mistake in policy. It, therefore, does not follow that the Court should assume that because a word was omitted which completely changes the meaning of the statute, that the Court should not interpret the statute. This is particularly true in view of the fact that the statute, as it now reads, clearly purports to give the Guam Legislature power to burden foreign and interstate commerce in any way it pleases under the Business Privilege and Gross Receipts Tax Law.

On the other hand, if the word "not" is considered to have been omitted inadvertently and should, therefore, be read into § 19541.0101, then the tax is

not being administered properly because it is extremely clear from the facts in this case that the gross proceeds of sales on tangible property in foreign commerce do constitute a part of the measure of the tax imposed.

IV. THE GROSS RECEIPTS TAX AS APPLIED TO APELLANT IS OF NON-LOCAL APPLICATION AND, THEREFORE, INVALID.

The Organic Act of Guam provides that,

> "The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. . . ." 48 U.S.C. § 1423a.

Insofar as appellant has been taxed for sales for off-island delivery, the tax is obviously of non-local application. The words "local application" have been construed by the Supreme Court of the United States. In *Granville-Smith v. Granville-Smith,* 75 S. Ct. 553, 349 U.S. 1, 99 L. Ed. 773 (1955), the Court held that "local application" obviously implies limitation to subjects having relevant ties within the territory. The Court also said,

> "In the circumstances, we cannot conclude that if Congress had consciously been asked to give the Virgin Islands legislative assembly power to do what no state has ever attempted, it would have done so."

The Guam Gross Receipts Tax Law clearly and expressly purports to burden foreign commerce. Gov. Code of Guam, § 19541.0101.

V. CONCLUSION

It is, therefore, respectfully submitted that the District Court of Guam erred in granting judgment on appellee's purported counterclaims and in refusing to enter judgment to appellant on the allegations of the first count of its complaint. It is, therefore, respectfully submitted that the judgment of the District Court of Guam should be reversed.

Dated, September 30, 1963.

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. SCOTT BARRETT